SUBJECT INDEX.

6511—20——1

AUTHORITIES CITED.

STATUTES.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

WILLIAM J. GIVENS, APPELLANT,
v.
FRED G. ZERBST, WARDEN OF THE UNITED STATES PENITENTIARY AT ATLANTA, GA. } No. 285.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF FOR APPELLEE.

This is an appeal from a judgment of the District Court dismissing a writ of habeas corpus sued out to discharge the appellant from confinement under a sentence of a court-martial.

THE PETITION.

The petition and the amendments thereto allege, in substance, that the petitioner was tried by a court-martial appointed at Camp Sevier, Greenville, S. C., by the commander of the camp; that the charge was a violation of the 92d Article of War, the specification being the murder of a private, one Will McLurkin, on the 28th day of September, 1918, at or near Camp Sevier, South Carolina; that the trial began on October 30, 1918, and was concluded on November 19, 1918, when the petitioner was found not guilty of

violating article 92, or of the specification of murder, but guilty of violating article 93 by committing manslaughter.

A copy of the promulgated sentence was exhibited. It is in the usual form and recites the convening of the court-martial pursuant to Special Orders, No. 172, Headquarters, Camp Sevier, S. C., and that there was arraigned and tried—

> Capt. William J. Givens, Infantry, United States Army.

CHARGE I. VIOLATION OF THE 92D ARTICLE OF WAR.

Specification in that Captain William J. Givens, Inf., U. S. A., did at or near Camp Sevier, S. C., on or about the 28th day of September, 1918, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Pvt. Will McLurkin, 3d Prov. Dev. Rgt., a human being, by shooting him with a revolver. It is then recited that the accused pleaded not guilty to both the charge and the specification, and that the finding was as stated above. Sentence is then recited as follows:

> To be dismissed the service and to be confined at hard labor, and at such place as the reviewing authority may direct, for ten (10) years.

And the document, which is signed by Woodrow Wilson at the White House April 14, 1919, concludes as follows:

> The sentence having been approved by the convening authority and the record of trial forwarded for the action of the President,

under the 48th Article of War, the following are his orders thereon:

In the foregoing case of Captain William J. Givens, Infantry, the sentence is confirmed and will be carried into execution. (Rec. p. 1, 5.)

The record of the court-martial being thus exhibited with the petition is collaterally attacked upon certain specified grounds as follows:

(1) That the record of the trial does not show that at the time of the commission of the crime in question the petitioner was an officer in the United States Army, nor that he was in any manner amenable to trial by court-martial;

(2) That the court-martial had no authority to hear and determine the charge of murder or the specification thereunder, because there was a time of peace in the United States when the crime was committed and because the pleadings did not negative such a time of peace; and

(3) That the sentence as confirmed and promulgated did not include confinement in the United States Penitentiary at Atlanta.

A second amendment to the petition assigned as an additional reason in support of the contention that the sentence and confinement were illegal: that the court-martial which tried the petitioner was not legally constituted, in that the officer who appointed it was a camp commander, and, as such, had no authority under the Articles of War to appoint other than a special court-martial. (Rec. p. 3, 6.)

THE RETURN.

The return asserted the validity of the sentence and confinement and averred that the petitioner had been received at the United States Penitentiary at Atlanta, under and by virtue of a commitment and documents, copies of which were exhibited. These consisted of a letter to the warden of the United States Penitentiary at Atlanta, signed by The Adjutant General of the Army, stating that the sentence had been approved and ordered carried into execution by the President and that the United States Penitentiary at Atlanta had been designated as the place of confinement, and of a copy of the promulgated sentence or General Court-Martial Order No. 139, being the same order, a copy of which was exhibited with the petition.

THE HEARING IN THE DISTRICT COURT.

The opinion of the district judge shows that the case was heard upon the petition and return, and upon evidence introduced on the hearing. The petitioner, however, has not preserved this evidence by a bill of exceptions and it is not a part of the record. Certain documents are copied into the printed record, tending to show that the petitioner was a captain in the United States Army at the time the crime was committed. These papers, however, are not made a part of the record by a bill of exceptions and there is no statement that they constitute all the evidence which was heard by the trial judge. In so far, therefore, as it was compe-

tent to establish by evidence any fact to support the judgment of the district judge it must be presumed that such evidence was introduced and was sufficient to support the judgment.

ISSUES INVOLVED.

There is no averment or claim that the petitioner was not in fact a captain in the United States Army, both when the crime was committed and when he was tried. The collateral attack upon the judgment of the court-martial is limited, except as to the claim that the crime was committed in time of peace, to a claim that the record of the trial fails to show facts essential to give the court-martial jurisdiction. The issues thus presented are:

(1) Does the record of the court-martial show that the petitioner was an officer in the United States Army?

(2) If not, does this render the judgment void or was it competent on the hearing in this case to prove aliunde that the petitioner was such an officer?

(3) Was it essential to the jurisdiction of the court-martial that the crime should have been committed in a time of peace in the United States?

(4) If so, was it necessary that this fact should be averred in the pleading?

(5) Assuming that the sentence was valid, has the United States Penitentiary at Atlanta been properly designated as the place of confinement?

(6) Did the camp commander at Camp Sevier have authority to appoint a general court-martial?

LAWS INVOLVED.

The provisions for trials by court-martial are contained in the Articles of War (39 Stat., ch. 418, pp. 650–670).

Article 2 provides in substance, among other things, that all officers and soldiers of the United States Army shall be included in the term "any person subject to military law."

Article 8 provides by whom general courts-martial may be appointed as follows:

> The President of the United States, the commanding officer of a territorial division or department, the Superintendent of the Military Academy, the commanding officer of an Army, an Army Corps, a division, or a separate brigade, and, when empowered by the President, the commanding officer of any district or of any force or body of troops may appoint general courts-martial; * * *

General Orders, No. 56, of the War Department, dated June 13, 1918 (Rec. pp. 12, 13), contain among other things the following:

> By direction of the President, the commanding officer of each of the following camps is empowered under the 8th Article of War to appoint general courts-martial whenever necessary. (Then follows a list of camps, including Camp Sevier, S. C.).

Article 92 of the Articles of War is:

> Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may

direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

Article 93 is as follows:

Any person subject to military law who commits manslaughter, mayhem, arson, burglary, robbery, larceny, embezzlement, perjury, assault with intent to commit any felony, or assault with intent to do bodily harm, shall be punished as a court-martial may direct.

BRIEF.

The very clear and exhaustive opinion of the district judge leaves but little to be said in support of his judgment. (Rec. pp. 27–30.) We have here a collateral attack upon the record of a court-martial which shows that the court-martial was appointed in October, 1918, by the commanding officer of Camp Sevier and tried a captain of Infantry on the charge of having violated article 92 by committing murder in September, 1918; that he was acquitted of this specific charge, but convicted of the charge, included therein, of violating article 93 by committing manslaughter; that the sentence was approved by the convening authority and promulgated by the President; and that by direction of the President the penitentiary at Atlanta was designated as the place of confinement.

Since the case of *Dynes* v. *Hoover* (20 How. 65, 82), there has been no room for doubt as to the

power of the civil courts over the judgments of courts-martial.

> The court-martial having jurisdiction of the person accused and of the offense charged, and having acted within the scope of its lawful powers, its decision and sentence can not be reviewed or set aside by the civil courts by writ of habeas corpus or otherwise. (*Johnson* v. *Sayre*, 158 U. S. 109, 118.)

The jurisdiction of a court-martial, however, can be challenged through the writ of habeas corpus and the civil courts thus called on to determine whether the jurisdiction existed. But if it appears that the court-martial has acted within the scope of its authority the civil courts can not inquire as to whether there has been error or irregularity in the proceeding.

> A writ of habeas corpus can not be made to perform the functions of a writ of error. To warrant the discharge of the petitioner, the sentence under which he is held must be, not merely erroneous and voidable, but absolutely void. (*Ex Parte Reed*, 100 U. S. 13, 23.)

I.

Record shows petitioner was an officer in the United States Army.

If the petitioner was an officer in the United States Army it must be conceded that he was subject to trial by court-martial on the charge of murder at any time except in a time of peace, and that he was subject to be so tried on a charge of manslaughter at any time. It is nowhere denied in the petition

that he was such an officer, either at the time the crime was committed or at the time he was tried. The only contention is that this fact does not sufficiently appear from the record of the court-martial. It is difficult to see how even this contention is borne out by the record. He was expressly described as a captain of Infantry in the United States Army and is charged with a violation of the 92d Article of War. This clearly shows that he was an officer in the Army. The most that seems to be claimed is that there is no specific averment that he was such an officer on the 28th day of September, 1918, when the crime was committed. This, however, is hypercritical. He was arraigned in October, 1918, and described as an officer in the Army and charged with a violation of the 92d Article of War. The specification is that "Capt. William J. Givens, Inf., U. S. A.," did on or about the 28th day of September, 1918, etc. The pleadings in court-martial proceedings are always brief. Here, however, the accused is described on the day of his arraignment as a captain in the Army, and again in the specification as to what was done on the 28th day of September when the crime was committed, he is described as a captain in the Army. By every fair implication this is a direct charge that while an officer in the Army he committed the crime specified.

The record, therefore, clearly shows all that is necessary to establish jurisdiction so far as that jurisdiction depended upon the accused being an officer in the Army.

II.

Question whether one convicted by court-martial was in fact an officer or soldier of the Army is one for an original inquiry by the civil courts in a habeas corpus proceeding.

As stated above, there is no contention here that petitioner was not, in fact, an officer in the Army. The sole contention in this regard is that the record of the court-martial did not show he was such an officer, at least at the time of the commission of the crime. It can not possibly be denied, however, that the record charges him with being such an officer at the time of his trial. It seems to us equally clear that the same charge is made with respect to the time of the commission of the crime, but if this latter statement was not correct the result would be that the record shows the trial and conviction of an officer and an effort on the part of the accused to show that the crime was committed prior to the time when he became an officer. Murder and manslaughter are both crimes, for which confessedly a court-martial may try an officer. The accused was described as an officer and charged with murder, which included the charge of manslaughter. Other questions aside, this shows a clear case of jurisdiction. So far as concerns the person of the accused and the subject matter of the charge, however, the recitals of the court-martial record are not conclusive.

> It can not be doubted that the civil courts may in any case inquire into the jurisdiction of a court-martial, and if it appears that the party condemned was not amenable to its jurisdic-

> tion, may discharge him from the sentence. (*In re Grimley*, 137 U. S. 147, 150.)

In the case just cited the court said that if Grimley was an enlisted soldier he was amenable to the jurisdiction of the court-martial, and then proceeded to examine the evidence in the habeas corpus case in order to determine whether he was, in fact, an enlisted soldier. In this case the petitioner was tried and convicted as an officer in the Army, as the record shows. If he was not such an officer, it was open to him to collaterally attack the judgment on that ground. While he did not do this, but merely contended that the record failed to show his status as an officer, evidence was introduced from which the trial judge held that he was in fact an officer. The correctness of that conclusion is not now open for review, because the petitioner has not seen fit to make the evidence a part of the record by a bill of exceptions. According to the opinion of the trial judge, the evidence clearly showed that petitioner served for several months as a first lieutenant and was serving as a captain prior to the commission of the crime, and the only effort made to overcome this was the claim that it was necessary for the Government to go further and prove that he actually took the oath. If a bill of exceptions had been filed so that this court could go into this question, it is clearly without merit. It is based entirely on the following language quoted from *In re Grimley* (137 U. S. 147, 156):

> Obviously the oath is the final act in a matter of enlistment. Article 47, respecting de-

sertion, reads: "Any officer or soldier who, having received pay, or having been duly enlisted in the service of the United States, deserts the same," etc. By this, either receipt of pay or enlistment determines the status; and after enlistment the party becomes amenable to military jurisdiction, although no actual service may have been rendered and no pay received.

In that case, however, the question as to whether the accused had actually entered the service was seriously contested and all the facts were brought before the court. He had rendered no service and there was a claim that, while he had started to enlist, the enlistment was in fact abandoned, both by him and by the Government. The court, however, simply held that, having taken the oath, there could be no question but that he had in fact enlisted and was, therefore, amenable to trial by court-martial. There was no intimation that a soldier or an officer by actually entering upon the service and the discharge of his duties would not become amenable to such trial even though he neglected to take the oath. And certainly no inference can be drawn from that case to the effect that, in order to prove that a man is either an officer or a soldier, it is necessary to prove that he took the oath. It is safe to say that proof that an officer had accepted his commission, reported for duty, and proceeded to discharge the duties of his office would be held in any court entirely sufficient to establish the fact that he was an officer and subject

to trial by court-martial. There is, in fact, no reason to doubt that in this case the petitioner did take the oath. If he had not, relying as his counsel did on the Grimley case, he would have undoubtedly produced evidence to that effect. But as stated above, this court is now precluded from any inquiry as to whether the petitioner was, in fact, an officer because the evidence upon which the district judge so held is not before the court, and hence the presumption is conclusive that it was sufficient to sustain his judgment.

III.

Question as to whether September 28, 1919, when the crime was committed, was in a time of peace is immaterial.

The next contention is that the crime was committed in a time of peace and, therefore, although an officer in the Army, petitioner was not subject to trial by court-martial. The contention is based upon the proviso of article 92 of the Articles of War to the effect that no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union or the District of Columbia in time of peace. The petitioner was charged with a violation of this article by committing murder. If he had been convicted of that charge, then the inquiry as to whether the crime was committed in a time of peace would be pertinent. He was, however, acquitted of the charge of murder and convicted under article 93 of manslaughter. It is equally clear that if he had been charged simply

with a violation of article 93 he would have been subject to trial by court-martial, whether in time of peace or time of war, because there is no limit upon the right to try him under article 93. He was subject to be tried under this article even in time of peace. He has not been sentenced for a violation of article 92 or for the crime of murder. He is not now restrained of his liberty on account of any judgment rendered under the authority of that article. The well-settled practice is, that the charge of murder includes the charge of manslaughter, and that one tried by court-martial upon a charge of violating one Article of War may properly be convicted of violating any other of the Articles of War which are included in that article. Thus in the case of *Dynes* v. *Hoover* (20 How. 65, 77), the accused was tried on a charge of desertion. He was acquitted of that charge but convicted of the charge of attempting to desert and the sentence pronounced upon this judgment was held to be valid. Even if it be conceded that the crime was committed in time of peace and that this would have rendered void any conviction by court-martial on the charge of murder, this concession could have no application to the judgment now under review, which was a conviction of a crime over which a court-martial has the same jurisdiction in time of peace that it has in time of war.

IV.

If it was essential to the jurisdiction of the court-martial that the crime should have been committed in time of war, it was not necessary that the pleadings should allege this fact.

If we assume that the validity of the judgment of the court-martial depends upon the fact that the crime was not committed in time of peace, it was not necessary that this fact should have been alleged in the pleading. The courts take judicial notice of the dates of the commencement and termination of any war in which the country is involved. (*United States* v. *Anderson*, 9 Wall. 56; *Sutton* v. *Tiller*, 6 Coldwell (Tenn.), 593; *Ogden* v. *Lund*, 11 Tex. 688.) If, therefore, it appears from the record that a crime was committed on a date between the commencement and termination of a war, the court may judicially know that the date in question was not in time of peace. In this case the crime was committed in September, 1918, when the United States was actually engaged in hostilities in a war in which nearly the whole world was involved. The trial was actually commenced before an armistice was signed, and concluded a few days thereafter. This court has held that the country was still in a state of war at a date many months later. (*Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146.) If, therefore, the judgment of the court-martial had been one which it had jurisdiction to pronounce only in time of peace, the judgment would have been authorized since the year 1918 was not a time of peace.

It will be observed that the proviso to article 92 of the Articles of War is, that no person shall be tried by court-martial for murder or rape committed within the jurisdictional limits of the States of the Union and the District of Columbia in time of peace. It is not said that such trials may be held only when the crime is committed within military lines or in territory in which civil courts have been compelled to suspend by reason of war. The distinction made is, that the necessities of actual war require a complete control of those engaged in military service which may not be required when war is not being actually waged. During the year 1918 actual hostilities were being carried on only in Europe, but the war operations conducted in this country were just as essential to success and just as much a part of the war as the fighting which was done across the Atlantic. The training and disciplining of troops in order to fit them for their part in the hostilities was the first essential to the successful conduct of the war. Numerous camps or cantonments were established throughout the country for this purpose. Military authority and discipline was just as necessary in these camps as in any part of the theater of war. Without the recruiting and training done here it would have been impossible to maintain the battle line. A very large proportion of the troops in France were not engaged in actual fighting. They were, however, performing just as important and necessary a function as the combat troops. The

protection of troops in these camps, and the prompt punishment of offenses against them was just as necessary and just as much a part of war operations as if the troops had been within the territory where the war was being waged. Indeed, war was being waged throughout the United States not only through maintaining these camps, but through the operating, night and day, of factories to turn out munitions of war and through myriads of other activities, all with the object of conducting the war to a successful conclusion. Moreover, in this case the crime was committed in one of the camps and by an officer against an enlisted man. These soldiers had been brought together under military command not in time of peace, but in time of flagrant and serious war. Surely the offense, though committed within the United States, was not committed in time of peace, and if the court-martial had found the petitioner guilty of murder there can be no doubt of its right to punish him even for that crime under article 92.

There is nothing in the case of *Caldwell* v. *Parker*, decided by this court on April 9, 1920, which militates against these views. That case dealt with the right of a State court to try and convict a soldier of murder. The case did not turn at all upon the question as to whether the crime was committed in time of peace. On the contrary, it was assumed that, as it was committed while the war with Germany was being waged, it was not committed in time of peace and the ques-

tion considered was whether the military courts had *exclusive* jurisdiction to try the accused. While expressing some doubt as to the exact meaning of the expression "except in time of war," the court declined to consider that question for the reason that if the offense then involved could have been tried by court-martial there was nothing to indicate an intention that the jurisdiction of the military courts should be exclusive. And since, in that case, the State court had first taken jurisdiction, it had the right to try the case even though a court-martial might have had jurisdiction in the first instance. This was in accord with previous holdings to the effect that a judgment by a court-martial would bar a subsequent prosecution in the civil courts for the same offense. (*Drury* v. *Lewis*, 200 U. S. 1; *Grafton* v. *United States*, 206 U. S. 333; *Franklin* v. *United States*, 216 U. S. 559.) Moreover, in that case the court was careful to point out the fact that the offense for which the accused was convicted was "for the murder of a civilian at a place within the jurisdiction of the State and not within the confines of any camp or place subject to the control of the civil authorities of the United States." Whatever doubt might exist of the authority of a court-martial in such a case, there can be no doubt in the case of a soldier accused of the murder of another soldier within the confines of a camp or place subject to the control of the military authority of the United States and where both the accused and the murdered were subject to military control.

V.

The penitentiary at Atlanta was properly designated by the reviewing authority in accordance with the usual practice in such cases.

The next contention is that, even if the petitioner was properly convicted, there is no authority for confining him in the particular penitentiary at which he is confined. This contention is clearly without merit. The sentence was that the petitioner be confined at hard labor at such place as the reviewing authority may direct. This is the form of sentence in common use and authorized in the manual for court-martials, page 189, paragraph 394. Article of War 42 authorizes the execution of such sentences in a penitentiary. In this case the convening authority approved the sentence. The record was then forwarded to The Adjutant General for action. The Secretary of War, pursuant to the 48th Article of War, forwarded it to the President, accompanied by a letter recommending the penitentiary at Atlanta as a place of confinement. (Rec. p. 21.) The President approved the sentence and directed that it be executed. The order designating the penitentiary at Atlanta was signed by The Adjutant General and recited that the President had approved the sentence and that the penitentiary mentioned had been designated as the place of confinement. If it be assumed, however, that the President alone was authorized to designate the place of confinement, this order must be treated as his order. In the

case of *United States* v. *Page* (137 U. S. 673, 680), meeting the contention that the President had not actually signed the order approving the sentence, the court said:

> On the contrary, where the record discloses that the proceedings have been laid before the President for his orders in the case, the orders subsequently issued thereon are presumed to be his and not those of the Secretary by whom they are authenticated; and this must be the result here, where the approval follows the submission in the same order.

This was quoted with approval and reaffirmed in *United States* v. *Fletcher* (148 U. S. 84, 89).

VI.

The camp commander was fully authorized by law to appoint the court-martial.

From what has been said it is obvious that the confinement of the petitioner is lawful if the court-martial was lawfully appointed and convened. The only reason urged against the lawfulness of the appointment, is that the petitioner was convicted by a general court-martial which was appointed by a camp commander, who, it is said, had authority only to appoint a special court-martial. It may be assumed that a camp commander is not one of those officers specifically named in article 8 of the Articles of War as authorized, without further authority, to appoint a general court-martial. But after conferring this authority specifically upon certain named

officers, article 8 provides that, when empowered by the President, the commanding officer of any district or of any force or body of troops may exercise this power.

A body of troops in one of the numerous camps maintained by the Army during the war was, of course, commanded by the commanding officer of the camp. Such an officer, therefore, was clearly included in those whom the President might empower to appoint general courts-martial. The power thus conferred upon the President was exercised by him in General Order No. 56, quoted above, by which he empowered the commanding officers of various camps, including Camp Sevier, to appoint general courts-martial. Apparently it is not denied that the President had the authority to thus empower the commanding officer, or that he did, in fact, exercise that authority. The contention seems to be simply that the petitioner must be released because the sentence as promulgated did not set out or refer to General Order No. 56. But the President was expressly authorized by article 8 of the Articles of War to make such orders as General Order No. 56, and the same being a rule or regulation by which the Army is to be controlled has the full force and effect of law. This court has said:

> It may be laid down as a general rule deducible from the cases, that wherever, by the express language of any act of Congress, power is entrusted to either of the principal departments of government to prescribe rules and

> regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice. (*Caha* v. *United States*, 152 U. S. 211, 222.)

This is in accord with numerous cases, some of which are cited in the opinion above quoted from, and others of which are *United States* v. *Grimaud* (220 U. S. 506) and *United States* v. *Symonds* (120 U. S. 46).

Since all courts are bound to take judicial notice of General Order No. 56, it was no more necessary that that order should be recited in the record or sentence of the court-martial than that the Articles of War themselves should have been recited. The unsoundness of the contention is clearly demonstrated in the opinion of the district judge in this case, in which he said:

> The record is not defective in failing to refer to General Order 56 as authority for Special Order 172, by which the court was constituted. While courts-martial are special courts of limited jurisdiction and have no presumptions to aid them (*Runkle* v. *United States*, 122 U. S. 543, 555; *McClaughery* v. *Deming*, 186 U. S. 49, 63), still it is not requisite for an inferior court to spread upon the record of each case which it tries the full pedigree of its powers. Its record need not

justify its existence generally, but should show the right to try the particular case. Otherwise this record must have shown not only the special order appointing its members and General Order 56, but also that the persons making these orders were really the commanding officer of Camp Sevier and the duly elected President of the United States. Obviously such things need not be made of record because they are to be judicially recognized.

This record does show the right of the court-martial to try the particular case, that is, a charge against a captain in the Army of a violation of one of the Articles of War.

CONCLUSION.

It is respectfully submitted that the record of the court-martial has not been successfully assailed, and that the judgment of the District Court dismissing the petition for habeas corpus must be affirmed.

WILLIAM L. FRIERSON,
Solicitor General.

R. P. FRIERSON,
Attorney.

August, 1920.

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